IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-355

HAROLD L. MCCORMICK, Executor of the Estate of George William McCormick, Deceased, and SUNSET DRIVE-IN THEATRE, a co-partnership,

Petitioners,

vs.

GERALD W. FINNERMAN and RICK ROBERT SPARR and SHIRLEY SPARR,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

STATUTORY REFERENCE

Petitioners made reference to the Colorado Workmen's Compensation Act on pages 3 and 6 of their Petition, stating the official Colorado citation. To dispel any allegation of non-compliance with Rule 23(d) of this Court, the original text of the Act, Colo. Rev. Stat. Ann. Sec. 81-1-*et seq.*, is found in volume 4, pages 889-1002 of the Colorado Revised Statutes 1963. Further amendments to the Act are found in supplemental volumes 9 through 12.

The statutory provision referred to on page 6 of the Petition is found in volume 10, pages 549-50. Although this provision was set forth (with nominal deletions) on page 6

of the Petition, it is herewith printed verbatim in the Addendum to the Appendix, *infra*.

STATEMENT

Petitioners are justified and correct in stating that McCormick "was employed by" Schenck's agent (page 2 of the Petition). The findings of the Referee of the Division of Labor and the affirmance by the Colorado Industrial Commission clearly show that McCormick was employed by and working for Schenck at the time of the accident. As the Referee stated, "a contract of hire was entered into between the deceased [McCormick] and the respondent employer [Schenck] and that the deceased was performing a valuable service for the employer" (page A-23 of the Petition).

REASONS FOR GRANTING THE WRIT

The Respondents, as well as the United States Court of Appeals, fail to comprehend the effect of the statutory bar of Colo. Rev. Stat. Ann. Sec. 81-4-4. This statutory provision operates to bar an action by an employee against a co-employee. In an attempt to circumvent this provision, the Court of Appeals and the Respondents create an artificial distinction between "permanent" and "special temporary" employment and between "employee" and "non-employee" status. The statute is automatically applied whenever co-employees (at the time of injury) elect to receive compensation benefits under the Act. Its effect cannot be stayed by a person claiming not to be a co-employee (*see* cases cited on page 6 of the Petition). McCormick, Finnerman, and Sparr were all employees of Schenck at the time of the accident. Since all three elected to receive benefits under the Act, any and all actions are barred against one another.

Furthermore, as Finnerman and Sparr received benefits under the Act, they will receive double compensation if they are allowed to maintain their action in the federal courts. As set forth on pages 9-10 of the Petition, the United States Court of Appeals' decision would allow the Respondents to receive full compensatory benefits under the Act and to seek compensatory damages at law. In essence, the Respondents would be doubly compensated for the same injuries. Pursuant to the United States Court of Appeals' decision, other persons in a similar factual circumstance would be entitled to double recovery. Clearly, the Colorado Workmen's Compensation Act was not intended for such construction, nor has it received such construction by the Colorado courts.

CONCLUSIONS

FOR THE FOREGOING REASONS, THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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November, 1974

ODENDUM TO THE APPENDIX

Election—Acceptance—Rejection

81-4-4. Acceptance as surrender of other remedies.— Such election and compliance with the provisions of this chapter, including the provisions for insurance, shall be, and be construed to be, a surrender by the employer, his insurance carrier, and the employee of their rights to any other method, form, or amount of compensation or determination thereof, or to any cause of action, action at law, suit in equity, or statutory or common law right or remedy or proceeding whatever for or on account of such personal injuries or death of such employee than as provided in this chapter, and shall be an acceptance of all the provisions of this chapter, and shall bind the employee himself, and for compensation for his death, shall bind his personal representatives, his widow and next of kin, as well as the employer, his insurance carrier, and those conducting their business during bankruptcy or insolvency.

Source: Amended by L. 67, p. 845, §3.